Supreme Court, U.S.
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No. 08-851

IN THE

Supreme Court of the United States

JACK J. GRYNBERG, GRYNBERG PRODUCTION CORPORATION, AND ITS SUCCESSORS; GRYNBERG PETROLEUM COMPANY, AND ITS SUCCESSORS, PETITIONERS

v.

TOTAL S.A. AND SHELL EXPLORATION B.V. AND SHELL INTERNATIONAL EXPLORATION AND PRODUCTION B.V. F/K/A SHELL INTERNATIONAL PETROLEUM MAATSCHAPPIJ B.V.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

SUPPLEMENTAL BRIEF

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NEW MATTER

Pursuant to Rule 15(8) of the Rules of the Supreme Court Petitioner Grynberg files this Supplementary Brief to bring to the Court's attention the following new matter:

Redd Iron, Inc. v. International Sales & Service Corporation, 2008 Colo. App. LEXIS 2178 (hereafter "*Redd Iron*") (attached hereto at App 1a) was decided by the Colorado Court of Appeals on December 24, 2008. The opinion was first available in Westlaw, most recently in LEXIS, and has not yet been published in the state's official reports. It was not available to counsel at the time the Petition for a Writ of Certiorari was filed.

The plaintiff in *Redd Iron* brought an action for, among other things, unjust enrichment. The parties filed cross-motions for summary judgment and judgment on the pleadings. The trial court ordered judgment on the pleadings in favor of the plaintiff on its unjust enrichment claim. The Colorado Court of Appeals vacated the judgment and remanded the case for factual findings consonant with the earlier opinion of the Colorado Supreme Court in *Lewis v. Lewis*, 189 P.3d 1134 (Colo. 2008) and related Colorado authority, exactly as Petitioner has argued should happen here in their Petition for Certiorari.

STATEMENT and ARGUMENT

1. Questions Under Review

The decision under review in this Petition is that of the Court of Appeals for the Tenth Circuit in *Grynberg v. Total, S.A.*, 538 F.3d 1336 (10th Cir. 2008). Petitioner has presented two claims of error, each independently calling for this Court to issue an Order of GVR. The second of the two arose from the Court of Appeals' failure to consider a controlling opinion of the Colorado Supreme Court which was issued after the arguments in *Grynberg v Total, S.A.* had been heard but eight days before its decision was issued by that Court. *Lewis v Lewis* was therefore the law of the state of Colorado at the time of the decision, despite the fact that it had not come to either Petitioner's or the Court of Appeals' attention at that time. Neither "new" case was followed by the Court of Appeals below. Had it done so, it is beyond likely that Colorado law correctly applied, would have resulted in a finding that Petitioners claims have not yet accrued, and so cannot be barred by limitations or laches. In short, following Colorado law would completely change the outcome of this litigation.

In *Grynberg v. Total, S.A.* the Court of Appeals affirmed two decisions of the federal District Courts which had granted the defendants' motions for summary judgment, dismissing Grynberg's claims for unjust enrichment on limitations (or laches), applying a Colorado three year bar from the date of accrual of the action.

In its Petition Grynberg argued (Petition at 9-11 and 23-26), that the decision in *Lewis* cast doubt on the Court of Appeals' interpretation and application of state law in this case. Specifically, under the rule announced in *Lewis*, summary judgment was improper without the "particularized factual investigation" of the circumstances giving rise to the unjust enrichment claim. Had the Court of Appeals considered *Lewis*, a remand to the District Court requiring that factual consideration would have been required. *Redd Iron*, the new matter, illustrates the need for and the scope of the required remand. The effect of following state law correctly as set out in *Lewis* and *Redd Iron* would be to reinstate Petitioner's cases in the District Courts, and a finding that the claims have not accrued, and so cannot be time-barred.

2. The New Case: *Redd Iron, Inc.*

In the *Redd Iron* case, the trial court granted the defendant's motions for summary judgment, as in this case. The Colorado Court of Appeals reversed, and remanded on the basis of *Lewis* "to permit the court to consider whether, under the standards set forth below, Redd is entitled to recovery on this claim..." i.e. whether a claim for unjust enrichment had accrued.

The Colorado Court of Appeals in *Redd Iron* concluded by stressing once again what both a trial court and an appeal court are obligated by post-*Lewis* law to do: [APP.p. 17-18a]

> [W]e cannot determine as a matter of law that Redd will be unable to show that other circumstances would render defendants'

> retention of the benefits unjust. Such a determination requires a "highly fact-intensive inquiry," . . . and that inquiry is within the province of the trial court, not this court.
>
> Accordingly, we vacate the judgment in favor of Redd on its unjust enrichment claim and return the case to the trial court with directions to determine, under the standards set forth above and after consideration of such additional argument and evidence as the court may require, whether the elements of unjust enrichment have been established. The trial court is also to make findings of fact sufficient to explain the basis for its determination.

While *Redd Iron* is a decision of the Colorado Court of Appeals, and not of the Colorado Supreme Court, it robustly underscores Petitioner's argument in the present case, that had the Tenth Circuit considered *Lewis v. Lewis*, it would have recognized that it should have reversed the judgments of the District Courts below, remanding the cause for the "intensive factual investigation" the *Lewis* opinion requires as a matter of Colorado law. Their failure violates the principles of federalism established by this Court.

3. Based on the Above, GVR Must be Granted

The importance of the new matter to Grynberg's Petition in this case is clear. Grynberg has asked that this Court grant *certiorari*, vacate the judgment of the Court of Appeals, and remand the case to that Court with instructions to proceed in a way consistent with

the principles of diversity jurisdiction that require its attention to the state law announced in *Lewis*.

In *Lords Landing Condominium Council v. Continental Insurance Co.*, 520 U.S. 893, 117 S.Ct. 1731, 138 L.Ed.2d 91 (1997) this Court granted *certiorari*, vacated the Court of Appeals' judgment and remanded the case for further proceedings consistent with the newly applicable state law (*i.e.*, the Court issued an order of GVR):

> This case fits within the category of cases in which we have held it is proper to issue a GVR order. 'Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is . . . potentially appropriate.'

The Court noted that the circumstances in *Lords Landing* were virtually identical to those of *Thomas* v. *American Home Products, Inc.*, 519 U.S. 913, 117 S.Ct. 282, 136 L.Ed.2d 201 (1996), in which GVR was likewise ordered, and in which Justice Scalia noted the Court's "'longstanding practice" of vacating a court of appeals' decision based on a construction of state law that appears to contradict a recent decision of the highest state court,'" citing in turn *Huddleston* v. *Dwyer*, 322 U.S. 232, 236, 64 S.Ct. 1015, 88 L.Ed. 1246 (1944) *(per curiam)*. In *Huddleston* the Court noted the

fundamental principle of federalism in diversity cases, *viz.* the federal courts' "duty . . . to ascertain and apply the state's law" correctly. The standard applied in Huddleston was that the implicated state court decision "has at least raised such doubt as to the applicable Oklahoma law as to require its reexamination . . ." 322 U.S. at 237. "GVR" is then the proper remedy so long as the case remains *sub judice* – as it is when the state court opinion predates (as it did in *Lords Landing* and in the present case) the judgment of the Court of Appeals. This Court, the opinion in *Huddleston* notes, need not address the issues of state law itself; but should require that the lower federal courts do so. Hence, the appropriateness of an order of GVR. And see *Lawrence v. Chater*, 516 U.S. 193, 116 S.Ct. 600, 133 L.Ed.2d 571 (*per curiam* 1996), elaborating on the authority for and advantages of the practice of ordering GVR.

CONCLUSION

The new matter of *Redd Iron, Inc.* sharpens and illustrates the necessity for an order of GVR because it shows much more clearly than Petitioner's brief that the Court of Appeals failed to follow Colorado law in this diversity case. Wherefore, Grynberg again respectfully requests that this Court grant his petition, vacate the judgment of the Court of Appeals, and remand the case to that Court with instructions appropriate to effect the principles of diversity jurisdiction and the controlling law of the State of Colorado.

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COURT OF APPEALS OF COLORADO,
DIVISION FIVE

Redd Iron, Inc.,
Plaintiff-Appellee,
v.
International Sales and Service Corporation, d/b/a Commercial Building Services, Inc., and ALSCO, Inc., d/b/a Steiner Corporation,
Defendants-Appellants.

December 24, 2008, Decided

NOTICE: THIS OPINION IS NOT THE FINAL VERSION AND SUBJECT TO REVISION UPON FINAL PUBLICATION

City and County of Denver District Court No. 06CV7908. Honorable R. Michael Mullins, Judge.

COUNSEL: Bloom Murr & Accomazzo, P.C., Joseph A. Murr, Daniel R. Delaney, Denver, Colorado, for Plaintiff-Appellee.

Benjamin, Bain & Howard, LLC, Alvin M. Cohen, Greenwood Village, Colorado, for Defendants-Appellants.

JUDGES: Opinion by: JUDGE VOGT. Russel and Gabriel, JJ., concur.

OPINION BY: VOGT

OPINION

Defendants, International Sales and Service Corporation, d/b/a Commercial Building Services, Inc. (CBS), and ALSCO, Inc., d/b/a Steiner Corporation (ALSCO), appeal the trial court's judgment in favor of plaintiff, Redd Iron, Inc., on Redd's claim of unjust enrichment. We vacate the judgment and remand with directions.

I. Background

ALSCO owns real property in Denver. It retained CBS as the general contractor to construct improvements on the property. CBS subcontracted with Excel Metals, Inc. to supply and erect steel for the construction project. Excel, in turn, subcontracted with Redd to provide labor and supplies for a portion of the steel work. Redd performed its work but was not paid by Excel.

Redd then commenced this action, asserting claims against Excel, CBS, and ALSCO for breach of contact, unjust enrichment, foreclosure of a mechanics' lien, and an adjudication of the rights of all parties claiming an interest in ALSCO's property. Redd was unable to locate or personally serve Excel or its registered agent and therefore served Excel by mail pursuant to section 7-90-704(2), C.R.S. 2008. Excel filed no response, and the trial court entered a default against it.

After CBS and ALSCO answered the complaint, Redd filed a "contested motion for judgment on the pleadings," asserting that the facts stated in the complaint and the answer established its right to

recover on its unjust enrichment claim. Shortly thereafter, CBS and ALSCO moved for summary judgment on all of Redd's claims, and the parties submitted affidavits supporting and opposing summary judgment. As to the unjust enrichment claim, CBS and ALSCO took the position that, under *DCB Construction Co., Inc. v. Central City Development Co.*, 965 P.2d 115 (Colo. 1998) (*DCB*), they could not have been "unjustly" enriched by Redd's services because they had engaged in no improper conduct. Redd argued that *DCB* was inapplicable and that defendants were liable because they received a benefit at Redd's expense.

The trial court entered summary judgment for ALSCO and CBS on three of Redd's four claims. It concluded that Redd's claim to foreclose its mechanics' lien was untimely, that there was no contract between Redd and CBS or Redd and ALSCO that would support a claim for breach of contract, and that Redd had no interest in the property that would permit it to seek adjudication of rights to the property. Redd has not appealed from this ruling.

On the same day it entered summary judgment, the trial court issued the following order granting Redd's motion for judgment on the pleadings:

> The Court, having reviewed the Plaintiff's Complaint and Motion, and Defendants' Answer and response to the Motion, if any, and considering itself sufficiently advised, hereby grants Plaintiff's Motion and orders the following:

> *DCB* . . . is not applicable in this case. Judgment is entered in favor of Redd Iron, Inc. against Defendants CBS and Alsco, jointly and severally in an amount to be determined.

The trial court subsequently entered judgment for Redd for $ 28,304 based on the parties' stipulation that that amount represented "the unpaid balance owed to Redd Iron for the work done for steel work which was fabricated for the Project."

II. Analysis

ALSCO and CBS contend that the trial court erred in ruling that, as a matter of law, Redd was entitled to recovery on its unjust enrichment claim. We conclude that the judgment must be vacated and the case remanded to permit the court to consider whether, under the standards set forth below, Redd is entitled to recovery on this claim and to make findings explaining the basis for its determination.

A. Standard of Review

In considering a motion for judgment on the pleadings pursuant to C.R.C.P. 12(c), the trial court must construe the allegations in the pleadings strictly against the movant, must consider the allegations of the opposing parties' pleadings as true, and should not grant the motion unless the pleadings themselves show that the matter can be determined on the pleadings. *Connecticut General Life Ins. Co. v. A.A.A. Waterproofing, Inc.*, 911 P.2d 684, 687 (Colo. App. 1995), *aff'd sub nom. Constitution Associates v. New Hampshire Ins. Co.*, 930 P.2d 556 (Colo. 1996); *see City*

& County of Denver v. Qwest Corp., 18 P.3d 748, 754 (Colo. 2001) (by granting plaintiffs' motion for judgment on pleadings, "the district court necessarily determined, in light of the controlling law and undisputed facts, that the matter could finally be resolved at that stage"). Our review of a trial court's determination of such a motion is de novo. *Connecticut General Life Ins. Co.*, 911 P.2d at 687.

C.R.C.P. 12(c) states that if matters outside the pleadings are presented on a motion for judgment on the pleadings "and not excluded by the court," the motion "shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Here, when the trial court ruled on Redd's motion for judgment on the pleadings, it had before it affidavits submitted in connection with the pending summary judgment motion filed by ALSCO and CBS. The court did not expressly exclude those affidavits, and we cannot determine whether the court in fact considered them in entering judgment for Redd. However, even if Redd's motion is treated as one for summary judgment under C.R.C.P. 56, our analysis remains the same. Entry of judgment was proper under that rule only if the material facts were undisputed and Redd was entitled to judgment as a matter of law. *See* C.R.C.P. 56(c). Our review remains de novo. *See Aspen Wilderness Workshop, Inc. v. Colorado Water Conservation Board*, 901 P.2d 1251, 1256 (Colo. 1995).

B. Unjust Enrichment

1. General Principles

Unjust enrichment is a form of quasi-contract or contract implied in law. The test for recovery under an unjust enrichment theory, as stated by the Colorado Supreme Court, requires a showing that: "(1) at plaintiff's expense, (2) defendant received a benefit (3) under circumstances that would make it unjust for defendant to retain the benefit without paying." *Robinson v. Colorado State Lottery Division*, 179 P.3d 998, 1007 (Colo. 2008); DCB, 965 P.2d at 119-20.

If the elements of unjust enrichment are established, the party who has received the benefit is ordinarily required to make restitution in the amount of enrichment received. That amount is often, but not always, coextensive with the other party's loss. Where the amount of the recovery may reasonably be measured in different ways, the choice is within the discretion of the trial court. *See Engel v. Engel*, 902 P.2d 442, 445 (Colo. App. 1995); *W.H. Woolley & Co. v. Bear Creek Manors*, 735 P.2d 910, 912 (Colo. App. 1986); Restatement (First) of Restitution § 1 cmts. a,d (1937).

Whether a party is entitled to recovery on a theory of unjust enrichment requires a trial court to "engage in a highly fact-intensive inquiry," *Dudding v. Norton Frickey & Associates*, 11 P.3d 441, 445 (Colo. 2000), and to "make extensive factual findings to determine whether a party has been unjustly enriched." *Lewis v. Lewis*, 189 P.3d 1134, 1140 (Colo. 2008). Where a ruling on unjust enrichment is based on facts developed at trial, an appellate court affords deference to the trial court's discretion to fashion equitable remedies, and it reviews for abuse of discretion; nevertheless, whether the trial court has applied the appropriate test to

determine the existence of unjust enrichment is reviewed de novo on appeal. *Id.* at 1140-41.

It is the third prong of the unjust enrichment test -- namely, whether the enrichment of the defendant was "unjust" -- that "creates difficult questions for trial courts." *Id.* at 1142; *see* DCB, 965 P.2d at 120 ("The notion of what is or is not 'unjust' is an inherently malleable and unpredictable standard."). Because the third prong of the unjust enrichment test is the focus of the dispute in this case, we turn our analysis to the standards governing that determination.

2. Standards for Determining Whether Enrichment is "Unjust"

In *DCB*, a contractor who had been hired by a commercial tenant to remodel its premises brought an unjust enrichment action against the landlord after the tenant became insolvent and could not pay for the work. After discussing unjust enrichment generally and the difficulties of determining what is unjust in a particular case, the supreme court concluded that it was "important to articulate a general rule, applicable in this context, that provides more stability and predictability than an ad hoc review." 965 P.2d at 120. The court continued:

> With this principle in mind, we begin our analysis with two basic propositions. First, there is the general rule that when an individual who is not the owner orders improvements on the owner's land and then fails to pay the contractor or supplier, "the owner is not liable to the contractor or supplier unless he agreed to pay

> them." 3 Dan B. Dobbs, *The Law of Remedies* § 12.20(3) at 473 (2d ed. 1993) . . . .
>
> . . . .
>
> Second, the Restatement of Restitution § 110 provides that "[a] person who has conferred a benefit upon another as the performance of a contract with a third person is not entitled to restitution from the other *merely* because of the failure of performance by the third person." Restatement of Restitution § 110 (1937) . . . .

Id. at 121 (emphasis in original).

Applying those principles to the case before it, the court concluded that the landlord's mere ownership of the improved property was not enough to subject it to liability. It disapproved the portion of a case from this court, *Frank M. Hall & Co. v. Southwest Properties Venture*, 747 P.2d 688, 690-91 (Colo. App. 1987), that would have permitted the tenant's unpaid contractor to recover from the landlord based solely on the fact that the landlord had given permission for the work and had taken an active role in its completion. *See DCB*, 965 P.2d at 122. Rather, the supreme court concluded: "[W]e hold that injustice in this context requires some type of improper, deceitful, or misleading conduct by the landlord." *Id.* Because there was no evidence that the landlord had engaged in such conduct, the tenant's contractor could not recover from the landlord on an unjust enrichment claim.

The rule announced in *DCB* was applied in R.A.S. Builders, Inc. v. Euclid & Commonwealth Associates,

965 P.2d 1242, 1244 (Colo. 1998), a case announced the same day as *DCB* and also involving a claim by a tenant's contractor against a landlord. There, the supreme court explained its rule as follows:

> In *DCB Construction*, we held that it is not enough that a tenant breached its contract to pay a contractor and that the landlord owns the property improved by the construction. . . . Instead, we concluded that the facts must also demonstrate an injustice such as fraud or coercion. . . . At a minimum, there must be some type of improper, misleading, or deceitful conduct by the owner. Otherwise, we adhere to the general rule that an owner is not liable for improvements made to his property for which he did not agree to pay.

Id. The supreme court also cited *DCB* in support of its statement in *Dudding*, 11 P.3d at 445 -- a case concerning the right of an attorney to recover in quantum meruit or unjust enrichment -- that: "Whether injustice results often will turn on whether a party engaged in some type of wrongdoing."

Divisions of this court have reached differing conclusions regarding the applicability of *DCB*'s "improper conduct" requirement in other contexts. *Compare Ameriquest Mortgage Co. v. Land Title Ins. Corp.*, P.3d , , 2007 Colo. App. LEXIS 1400 (Colo. App. No. 06CA0847, July 26, 2007)(*cert. granted* Aug. 4, 2008) (lender's failure to present evidence of wrongdoing by deed of trust beneficiary did not preclude lender's request for equitable subrogation on theory of unjust enrichment; division stated that it did

"not read . . . *DCB* as requiring a showing of wrongful conduct in every unjust enrichment case"), *with Ciccarelli v. Guaranty Bank*, 99 P.3d 85, 90 (Colo. App. 2004) (relying on *DCB* in concluding that trial court misapplied third element of unjust enrichment claim where there was no evidence that defendant bank had acted in an improper or deceitful manner), *overruled in part on other grounds by Lewis*, 189 P.3d at 1141.

In *Lewis* -- announced in 2008, ten years after *DCB* and shortly after the entry of the judgment at issue in this appeal -- the supreme court addressed the scope of its holding in *DCB*.

Lewis involved a dispute among family members over the proceeds from the sale of a house. The supreme court concluded that, in such circumstances, it was necessary to consider the "mutual purpose" of the parties in determining the third prong of the unjust enrichment test. 189 P.3d at 1143. In so concluding, the court held that the "particularized analysis for the third prong of unjust enrichment" enunciated in *DCB* was limited to the landlord-tenant contractor context:

> [In *DCB*] [w]e held that, in claims against a landlord, where there is no direct relationship between the landlord and the contractor creating a contract or quasi-contract and the landlord did not act fraudulently, the landlord is not unjustly enriched when he receives a benefit from the failed contract between a tenant and a party working at the tenant's behest. . . . However, we were quick to note that the requirement of malfeasance is specific to a contractor's claim that the landlord was unjustly enriched and did

> not extend to all unjust enrichment circumstances.

Id. at 1142. According to the *Lewis* court, the rule set forth in *DCB* was "crafted . . . '[b]ecause tenants frequently contract for improvements to leased property, [and therefore] the law must be sufficiently predictable so that the appropriate parties can adequately calculate and make adjustments for the risks they face.'" *Id.* (quoting *DCB*, 965 P.2d at 121). The court also noted that, in *Ameriquest*, the division had "correctly held that our *DCB* holding requiring malfeasance applies only in situations where a landlord receives a benefit from a failed contract between a tenant and a party working at the tenant's behest." *Lewis*, 189 P.3d at 1143 n.5.

Thus, the supreme court has now made clear that the "particularized analysis" of *DCB*, which requires a showing of malfeasance in order to establish the third unjust enrichment prong, was intended to apply specifically to claims against a landlord by a party working at the tenant's behest, and that malfeasance need not invariably be shown to establish unjust enrichment.

However, that conclusion does not resolve the issue presented here -- namely, what showing must a subcontractor make to establish that retention of benefits it provided to a property owner or a general contractor is "unjust" for purposes of the third prong of the unjust enrichment test. While the inquiry will depend to a large extent on the facts of the specific case, *see DCB*, 965 P.2d at 120, certain generally applicable principles can be gleaned from our supreme

court's cases, from the authorities on which the supreme court has relied, and from cases from other jurisdictions that have addressed the issue.

3. Unjust Enrichment Claims by Subcontractors Against Property Owners and General Contractors

For the reasons set forth below, we conclude that a subcontractor seeking recovery from a property owner or a general contractor on an unjust enrichment theory must, to satisfy the third prong of the unjust enrichment test, establish some basis for finding injustice beyond the simple facts that (1) the owner or contractor benefitted from services the subcontractor provided, and (2) the subcontractor was not paid for its work.

In so concluding, we note first that the "general rules" recognized by the supreme court in *DCB* and *R.A.S.* -- i.e., that a property owner is generally not liable for improvements on his property for which he did not agree to pay, and that mere nonperformance of a contract by a third person is not enough to require the benefitted party to compensate the party suffering a loss because of such nonperformance -- are not limited to the context of disputes between landlords and parties who contracted with their tenants. Restatement of Restitution § 110, cited in *DCB*, states: "A person who has conferred a benefit upon another as the performance of a contract with a third person is not entitled to restitution from the other merely because of the failure of performance by the third person." Neither the rule stated in that section nor the illustrations following it suggest that the rule is limited to any specific context.

Additionally, section 12.20(3) from Dobbs, *The Law of Remedies* -- also cited in *DCB* -- makes clear that the principle it discusses is applicable in situations involving claims by subcontractors against property owners:

> In the subcontractor setting, the rule insulates the owner from liability, even though the owner benefitted from a subcontractor's work, knows the work is being done, and wishes to have the improvement; this is so because the owner's agreement is to pay the general contractor, not the subcontractor. An additional reason is that if the owner has paid the general contractor the price due, the owner is not enriched in any legal sense; he will have received what was his due under the contract, no more.

Id. at 472-73.

Cases from other jurisdictions, adopting the position stated in Dobbs and in Restatement of Restitution § 110, have generally declined to allow unjust enrichment recovery by subcontractors against property owners or by sub-subcontractors against general contractors with whom they did not deal directly. *See Bennett Heating & Air Conditioning, Inc. v. Nationsbank of Maryland*, 342 Md. 169, 674 A.2d 534, 540-41 (Md. 1996) (collecting cases, and observing that: "The reported decisions involving claims by unpaid subcontractors against owner based on unjust enrichment do indeed almost uniformly deny relief, and . . . these cases do not turn on whether the owner has fully paid the general contractor."); *see also Advance Leasing & Crane Co. v. Del E. Webb Corp.*, 117 Ariz. 451, 573 P.2d 525, 527

(Ariz. Ct. App. 1977) ("[Supplier] assumed the risk that [subcontractor] would be able to pay. This risk cannot now be shifted to [the general contractor]."); *Season Comfort Corp. v. Ben A. Borenstein Co.*, 281 Ill. App. 3d 648, 655 N.E.2d 1065, 1071, 211 Ill. Dec. 682 (Ill. App. Ct. 1995) (secondary subcontractor could not recover from general contractor or property owner on unjust enrichment theory; subcontractor had not availed itself of mechanics' lien remedy, and it was not unjust to allow general contractor or property owner to retain benefits acquired); *Guldberg v. Greenfield*, 259 Iowa 873, 146 N.W.2d 298, 305-06 (Iowa 1966) (subcontractor who was not paid by general contractor was not entitled to recover from homeowners on unjust enrichment theory); *J.W. Thompson Co. v. Welles Products Corp.*, 243 Kan. 503, 758 P.2d 738, 745 (Kan. 1988) (company that sold parts to a supplier had no unjust enrichment claim against contractor); *Pendleton v. Sard*, 297 A.2d 889, 895 (Me. 1972) ("[W]e conclude that under ordinary and usual circumstances the equities will not permit the supplier of labor and materials to obtain a personal judgment against the owner with whom he had no contractual dealings."); *Mon-Ray, Inc. v. Granite Re, Inc.*, 677 N.W.2d 434, 440 (Minn. Ct. App. 2004) (subcontractors were not entitled, under unjust enrichment theory, to recover from project developer the funds that were forfeited by bankrupt general contractor); *Insulation Contracting & Supply v. Kravco, Inc.*, 209 N.J. Super. 367, 507 A.2d 754, 760 (N.J. Super. Ct. App. Div. 1986) (sub-subcontractors had no unjust enrichment claim against general contractor); *see generally* J.R. Kemper, Annotation, *Building and Construction Contracts: Right of Subcontractor Who Has Dealt Only with Primary Contractor to Recover Against Property*

Owner in Quasi Contract, 62 A.L.R.3d 288 (1975 & 2008 cum. supp.).

We acknowledge that some of the cases discussed above have cited the subcontractor's failure to pursue other available legal remedies, such as foreclosure of a mechanics' lien, as one basis for holding that unjust enrichment relief was unavailable. In our view, this rationale would not alone preclude recovery on an unjust enrichment claim under Colorado law. *See* § 38-22-124, C.R.S. 2008 ("No remedy given in this article [the general mechanics' lien law] shall be construed as preventing any person from enforcing any other remedy which he otherwise would have had, except as otherwise provided in this article."); *DCB*, 965 P.2d at 118 n.2 ("By statute and case law, contractors and others may still pursue any other available remedies [in addition to mechanics' lien remedies], such as breach of contract or unjust enrichment."); *Frank M. Hall & Co.*, 747 P.2d at 690. Therefore, we do not agree with ALSCO's and CBS's argument that allowing unjust enrichment recovery after Redd let its lien rights expire would eviscerate the procedural requirements of the mechanics' lien law.

Nevertheless, we conclude that the broader principle recognized in the cases and the authorities cited above is consistent with the "general rule" recognized by the Colorado Supreme Court in *R.A.S.* and *DCB* -- namely, that property owners are ordinarily not liable to unpaid subcontractors on an unjust enrichment claim merely because they benefitted from the services provided. We do not read *Lewis* to hold that the supreme court would depart from this general rule in cases involving unjust enrichment claims by subcontractors.

C. Application

Turning to the case before us, we first note that the trial court did not err in concluding that the "improper conduct" requirement of *DCB* was inapplicable here. It does not follow from this, however, that Redd was entitled to judgment as a matter of law on its unjust enrichment claim.

Redd was required to prove all three elements of that claim, as well as the value of the benefit it conferred. *See DCB*, 965 P.2d at 119-20; *Engel*, 902 P.2d at 445. As to the first two elements, it appears undisputed that Redd performed services and that it was not paid the $ 28,304 that it claimed was owed to it. However, although CBS and ALSCO admitted in their answer that Redd had conferred a benefit on Excel, and that Excel "accepted the benefit under circumstances that would render it unjust for it not to pay" for the benefit, CBS and ALSCO did not admit that they themselves had been benefitted or that the value of any such benefit was $ 28,304.

Also, in his affidavit opposing summary judgment, Redd's president attested that discovery was "required to ascertain . . . facts such as what payments [defendants] have made for materials and services furnished by Redd Iron, whether [defendants'] payments to Excel, if any, allegedly included payments for the work performed by Redd Iron, on what dates and to whom those payments were allegedly made, and the date of the last work performed, the last materials furnished, or the date of completion of the building or improvement on the property." Further, although CBS's president stated in his affidavit that "CBS paid

to Excel all amounts which CBS owed to it," and "ALSCO paid to CBS all amounts which ALSCO owed to it," he also attested that Excel had "failed to properly complete its work and, indeed, abandoned the project."

In these circumstances, it cannot be said that the first two elements of Redd's unjust enrichment claim, and the value of any benefit conferred, have been established as a matter of law.

Further proceedings are also required to determine whether, even if the first two elements of the unjust enrichment claim are established, the circumstances make it "unjust" for ALSCO and CBS to retain any benefit they received. As discussed above, ALSCO's ownership of the property, and CBS's status as a general contractor who has been paid, do not alone make their retention of such benefit unjust. Nor does Excel's failure to pay Redd suffice, without more, to satisfy the third unjust enrichment prong. Although CBS's president has attested that all amounts owing were paid, we cannot determine as a matter of law that Redd will be unable to show that other circumstances would render defendants' retention of the benefits unjust. Such a determination requires a "highly fact-intensive inquiry," *Dudding*, 11 P.3d at 445, and that inquiry is within the province of the trial court, not this court.

Accordingly, we vacate the judgment in favor of Redd on its unjust enrichment claim and return the case to the trial court with directions to determine, under the standards set forth above and after consideration of such additional argument and evidence as the court may require, whether the elements of unjust

enrichment have been established. The trial court is also to make findings of fact sufficient to explain the basis for its determination.

The judgment is vacated and the case is remanded for further proceedings in accordance with the views set forth here.

JUDGE RUSSEL and JUDGE GABRIEL concur.